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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO MEDINA,

Defendant and Appellant.

B212315

(Los Angeles County  
Super. Ct. No. PA054052)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shari Silver, Judge. Affirmed.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Eduardo Medina<sup>1</sup> appeals from the judgment entered following his conviction by jury of kidnapping for ransom, attempted kidnapping for ransom, and robbery, with the finding that he personally used a firearm during the commission of the three offenses, and being a felon in possession of a firearm. (Pen. Code, §§ 209, subd. (a), 664/209, subd. (a), 211, 12022.53, subd. (b), 12021, subd. (a).) He contends: (1) he was prevented from presenting a defense due to an erroneous evidentiary ruling; (2) the prosecutor committed prejudicial misconduct; (3) there was instructional error; (4) counsel provided ineffective assistance; and (5) cumulative error requires reversal. Finding no error, we affirm the judgment.

## **STATEMENT OF FACTS**

### **The Prosecution Case**

On December 10, 2005, Veronica Villarreal was working at a Shakey's pizza restaurant owned by her mother, Rosa Beltran. At about 7:00 p.m., as Villarreal was finishing her shift, her sister-in-law Cynthia Lopez, who also worked at the restaurant, arrived to begin her shift. The women decided to go to the movies and convinced the manager to let Lopez leave because business was slow.

The two left the restaurant and walked toward Villarreal's SUV. Villarreal was carrying her purse, which contained \$2,000. It was money from the restaurant that she intended to give to her mother. Villarreal entered her vehicle on the driver's side and Lopez got into the front passenger seat. Villarreal began to back up when she realized that the SUV had a flat tire. She got out and went into the restaurant to ask the manager to help her with the spare tire. Lopez remained in the vehicle. When Villarreal left, the engine was running and the driver's door was open, which illuminated the SUV's interior lights.

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<sup>1</sup> This was the name used in the information. At trial, defendant spelled his name Eduardo.

A man entered the driver's side of Villarreal's vehicle, pointed a gun at Lopez, and told her to retrieve her purse and get out. As she complied, he took Villarreal's purse.<sup>2</sup> The man pointed to a van that was directly behind Villarreal's vehicle and told Lopez to get inside. He told her to get on the floor in the back of the van.

After about five minutes in the restaurant, Villarreal returned to her vehicle. She immediately noticed that the engine was not running, the doors were closed, the interior lights were off, and Lopez was gone. She also observed a blue van behind her SUV. There was a man sitting in the rear seat on the driver's side and the door to the van was open. Villarreal thought the person was her stepfather, so she approached and asked, "What are you doing?" As she got to within four feet of the van, she realized that she was mistaken. The man jumped out of the van, pointed a gun at Villarreal, and started running after her. Villarreal screamed and turned to flee. The man was able to grab her clothing, causing Villarreal to drop her cell phone. She struggled to get away. Her pursuer took two or three steps and fell to the ground, allowing Villarreal to run inside the pizza restaurant.

Lopez heard Villarreal approach and begin to scream. The man got out of the van. She saw Villarreal run toward the restaurant. The man returned to the van and a second person drove it away. As they traveled, Lopez asked why they were taking her. The man with the gun answered, "You know why; don't act stupid."

Once inside the restaurant, Villarreal called 911. While she was speaking to the operator, Lopez called on the restaurant's other line and informed Villarreal that she had been taken. At the gunman's direction, she told Villarreal not to call the police. Villarreal ended the 911 call. A male voice came on Lopez's line and said in Spanish,

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<sup>2</sup> Villarreal's purse was later returned, however, the \$2,000 that had been inside was gone.

“Don’t act stupid. You know why we got her.” He said something to the effect that Villarreal’s mother owes money. Villarreal hung up.<sup>3</sup>

After police arrived at the restaurant, Villarreal called her stepfather to tell him and her mother, Rosa Beltran, that someone had kidnapped Lopez. They returned to the restaurant. While there, Beltran’s cell phone rang and Villarreal answered it. Lopez asked to speak to Beltran. Pursuant to the man’s instructions, Lopez told Beltran that the kidnappers wanted \$500,000.

The van came to a stop. The men put a bag over Lopez’s face and walked her to a building. Lopez noticed other men standing outside. Inside the location, a third man joined the two who had been in the van. Lopez was locked in a bathroom. At various times during the evening, Lopez was directed to place calls to Beltran. Lopez was told what to say and would relay Beltran’s answers.

Eventually, Beltran told the men that she could only raise \$100,000. The men said they wanted the \$100,000 and drugs. After Beltran stated that she did not know where to get drugs, the men agreed to take just the money. The men told Lopez they had to leave, covered her face, and led her to what she believed was the same van that she had been in earlier. They explained to Lopez that they had to move because someone’s mother was returning to the location.

Lopez’s kidnappers made statements that led her to believe that they knew details about her family and had been surveilling them. For example, they knew where she had been the day before and had tracked a vehicle that left her house to go to the Shakey’s restaurant. During the ordeal, she heard the driver refer to the gunman as Javier.

On the evening of the next day, her captors agreed to let her go. She was told that she would be exchanged for the money. Her face was covered and she was led to the van. The vehicle stopped and Lopez got out, escorted by the person who had driven the

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<sup>3</sup> Villarreal told police that the man who chased her was about five feet seven inches tall and fat or chubby. She estimated his weight as being over 200 pounds. He had a thick black mustache and was wearing dark clothing. At trial, she said that she did not recognize anyone in the courtroom from the night of the kidnapping.

van from the Shakey's parking lot after the kidnapping. The men attempted to call Beltran, but she did not answer. After several attempts, the parties made contact and Lopez spoke to Beltran. Beltran said she did not want to make the exchange in a dark place because she had so much money. Lopez told her she would stand in the street and wait for the Lexus that Beltran would be driving. Lopez and the driver remained and waited. Lopez ventured to the street corner and looked for Beltran's car. Suddenly, police officers appeared and rescued her.

Lopez spoke to police shortly after the incident and described the man with the gun as having a tattoo underneath his left jaw.<sup>4</sup> He was about as tall as her boyfriend, who is approximately six feet tall, and weighed between 220 and 240 pounds. When asked at trial, she said the gunman did not appear to have any serious physical shortcomings.

Two days after the kidnapping scheme was thwarted, Lopez was shown 73 photographs spread out over several pages. On one of the pages, she circled defendant's picture and wrote, "E-7 is the person that took me into the van with the gun." A few days later, Lopez was shown a photographic lineup consisting of six pictures. She circled the picture of defendant and wrote that the person "was driving the van when I was kidnapped. He held me for two days." She was certain of both of her identifications. However, Lopez testified that she did not recognize defendant at the preliminary hearing in July 2006 or at the trial, which occurred two and a half years after the crime.

Eighteen-year-old Roberto Alba was arrested on the street when police swooped in to rescue Lopez.<sup>5</sup> He was interviewed at the police station and immediately confessed to participating in the kidnapping scheme. At first, he did not mention defendant because he was afraid that he would harm Alba's family. Eventually, Alba told police that Yuni (the name by which Alba knew defendant) was involved. Alba said that he had known

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<sup>4</sup> Defendant had no such tattoo, although he had a large one on his chest.

<sup>5</sup> Lopez identified Alba from the six-pack as the driver of the van.

defendant for about five to six months prior to the crime. He also had met defendant's wife, Martha, and their two children.<sup>6</sup> Alba was unaware that defendant's true name was Edwardo Medina.

On December 9, the day before the kidnapping, Alba met with defendant, who asked him if he wanted to make some quick money. Defendant mentioned the figure of \$50,000, and Alba said he was interested. Defendant, driving a dark blue van, took Alba to Beltran's pizza restaurant. They parked nearby and waited an hour or two. Defendant pointed to a male and female in the restaurant parking lot and told Alba that they were very rich and that he and Alba were going to kidnap them. Defendant said the two were the son and daughter of the owners of the restaurant. Defendant then drove to the San Fernando Valley, where he showed Alba several houses and said the rich couple owned them. Alba agreed to assist defendant with the kidnapping.

Alba and defendant returned to the restaurant parking lot. They saw a girl exit the restaurant and get into an SUV.<sup>7</sup> She began to drive away and they followed in the van. The men planned to take Villarreal after she stopped, however, she drove too quickly and they did not have an opportunity. The attempt was abandoned.

The men met the next day, December 10. They drove to an auto parts store to purchase a device that lets the air out of vehicle tires. Defendant explained that they were going to flatten a tire on Villarreal's SUV and wait for her to get out of the vehicle. When she did, they would grab her. Alba drove the van to the restaurant parking lot and parked next to Villarreal's SUV. Defendant got out and flattened the rear tire on the driver's side of the SUV. The men left to get something to eat.

When they returned to the restaurant parking lot, Alba noticed a girl was already inside the SUV and the front door was open. Defendant parked the van directly behind the SUV. He got out of the van, went to the SUV, and took Lopez at gunpoint. He

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<sup>6</sup> A defense witness confirmed that defendant's ex-wife was named Martha.

<sup>7</sup> We assume Alba was referring to Villarreal because when he was asked whether he saw the same girl whom he later helped to kidnap or the second girl, he answered, "No. The second girl."

brought her to the van and directed her to sit on the floor in the rear. Alba moved into the driver's seat of the van.

Alba realized Villarreal had returned to the parking lot when he heard her yell. Defendant got out of the van and ran after her. Alba said he noticed defendant had problems with his mobility when he was unable to catch Villarreal. Alba was surprised that he could not. Defendant got back into the van and Alba drove to defendant's friend's house in South Central Los Angeles. Lopez's hands were tied, her head was covered, and she was led into the house and placed in a bathroom. At the home, Alba met a Hispanic male, who did not seem surprised to see them.

Utilizing Lopez's cell phone, defendant called the girl's family. Defendant placed the call, handed the phone to Lopez, and told her what to say. Defendant introduced himself to Lopez as Javier.<sup>8</sup> The group had to move to a second location because the Hispanic male's mother was returning home. They used the van and drove to the projects.

The next day, Alba understood that negotiations for Lopez's return had been completed. At about 4:30 p.m., the three men and Lopez got back into the van and defendant drove to a location. Alba, the Hispanic male, and Lopez got out of the van to wait for the money. Alba was told that after they received the money, the men were to walk to the next block to meet defendant. After about 15 or 20 minutes, police arrived. Lopez was rescued and Alba was arrested.

The day after Alba's arrest, officers showed him the same series of photographs that Lopez had seen. He circled defendant's picture and wrote, "E-7 was the guy that was with me in the car and he was the one that tied up — tied the girl up. He planned everything. Also gave me crystal meth and ice. He also picked me up from home, drove me to Shakey's." Alba told police that defendant had a twitch when he spoke.

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<sup>8</sup> Later, Alba said defendant referred to himself as Sergio in Lopez's presence. Alba also testified that defendant introduced himself to Lopez as Javier Sergio. The detective who interviewed Alba after his arrest said Alba told him that defendant used the name Javier Sergio.

On March 8, 2006, Los Angeles Police Department Detective Wesley Potter received information that defendant was in the area of North Long Beach. Potter and other officers went to that location and waited. After about an hour, defendant emerged from one of the buildings and got into a blue van. An officer in an unmarked car approached defendant's vehicle and activated a red light. Defendant started the van and immediately drove down the street. This began an 11-mile pursuit that involved six or seven police vehicles.

During the chase, defendant drove 40 to 50 miles an hour through residential streets and made numerous turns. After running a red light and striking another vehicle, defendant continued through the intersection and entered the freeway. He drove at speeds in excess of 100 miles an hour and was followed by several marked patrol units utilizing their red lights and sirens. Defendant had collisions at two separate freeway interchanges.

Eventually, the right front tire of defendant's van began to shred. When the tire disintegrated, defendant stopped the vehicle. Police used their public address system to order him out of the van, but he did not comply. The officers used their cars to surround the van. After three hours of negotiation, defendant surrendered.

A detective who transported defendant to the station and spoke to him briefly observed that defendant had limited mobility in his right arm and hand. Defendant also spoke very slowly and his lip seemed somewhat paralyzed.

### **The Defense Case**

On the evening Lopez was kidnapped, Juan Sandoval was working at Shakey's. At about 6:30 or 7:00 p.m., Villarreal came inside and told him that Lopez had been taken. Sandoval and Villarreal went outside and he saw a male in the parking lot running away from the direction of the restaurant. The man stopped, pointed a weapon at Sandoval, and told him to get back. Sandoval told police that he thought the man was about five feet four inches tall. Defendant was measured during the trial and his height



was found to be five feet six and one-half inches. Sandoval did not recognize defendant in court.

On December 10, Rosa Beltran learned that Cynthia Lopez had been kidnapped. She received a phone call from a man who claimed to have her. She did not recognize the man's voice. A tape of the call was played for the jury.<sup>9</sup>

Evelyn Lainez knows defendant, as he is the ex-husband of a friend. She calls him Yuni. She last saw defendant in December 2005 at a family gathering to celebrate the birthday of defendant's son. Lainez said defendant limped, spoke in a manner that was difficult to understand, and dragged his right arm.

Another acquaintance, Janet Gonzalez, who lived with defendant's former sister-in-law, also described defendant's physical difficulties. She said he could not lift his hand, required a brace to walk, and was unable to speak clearly. Gonzalez recalled that on December 11, 2005, she saw defendant at a party for his son. When she arrived at 4:00 or 5:00 p.m., he was already there.

Gonzalez said that in June of 2008, approximately a month before the trial, she was approached by two Latino males. She had never seen them before. The men asked her if her name was Janet. After she said no, they told her that she should not go to court. The men informed her that they knew where her family lived. She reported the incident to the police. Gonzalez denied being afraid to testify.

Defendant said that he had disabilities caused by gunshot wounds he received in 2001. He was struck by five bullets. One lodged in his back and another in his right arm. As a result, he had difficulty speaking, needed a leg brace to walk, and had limited use of his right arm. If he used his brace, he was able to drive a car.

Defendant admitted he had suffered four prior felony convictions: (1) in 1996 for drug sales; (2) in 2002 for being a felon in possession of a firearm; (3) in 2002 for evading a police officer; and (4) in 2004 for receiving stolen property.

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<sup>9</sup> The tape was also played for Roberto Alba. He said the male voice belonged to defendant.

On December 11, 2005, defendant was at his mother's house celebrating his son's birthday. He saw Evelyn Lainez at the gathering. Later that month, he learned the police were looking for him. Defendant said that he had never been in the San Fernando Valley and did not plan the kidnapping of Cynthia Lopez. He stated that he saw Lopez for the first time when she testified at the preliminary hearing. Defendant said he saw Roberto Alba once during October 2005 in the company of defendant's sister-in-law. Defendant did not claim that he spoke to Alba on that occasion. He admitted using different names, including the nickname Yuni.

## **DISCUSSION**

### **I. Defendant's Claim That He Was Barred From Presenting Evidence**

Stating that the outcome of this case hinged on identification testimony, defendant contends the trial court's erroneous evidentiary ruling prevented him from presenting crucial testimony from an eyewitness identification expert. We outline the court's rulings pertinent to defendant's assertion.

Defendant attempted to convince the jury that the injuries caused by the gunshot wounds he sustained in 2001 made it unlikely that he was involved in the alleged kidnapping scheme in 2005 for two reasons. One, given his physical limitations, he could not have been the described gunman. The gunman ran after Villarreal, something defendant could not do. In addition, the witnesses and the jury heard the voice of the kidnapper. That man spoke clearly, while defendant mumbled and was difficult to understand. Two, if he had been one of the kidnappers, the witnesses, in particular Cynthia Lopez, would have readily noticed his inability to use his arm, walk quickly, or speak clearly. He stressed that a witness would have noticed his lip, which one detective described as suffering from "some type of paralysis."

In his direct examination of Lopez, the prosecutor tried to elicit testimony that she had noticed something different about the lips of the man who had the gun. He asked, "Do you remember mimicking or demonstrating to the detective sitting next to me or

other detectives the way the person's lip was when he was talking?" Lopez replied, "I don't remember." Lopez acknowledged that she recently had heard a tape recording of her interview with detectives. After reading a portion of the transcript while on the witness stand, she said, "I — I don't remember, like, him having something on his lip anymore." After the prosecutor interjected, she completed her answer. "I just remember his — his mustache."

In light of Lopez's inability to remember her prior statement that she recalled something unusual about the gunman's lip, the prosecutor sought to introduce her prior statement to detectives to that effect. Although the detectives did not clarify what she meant during the interview, Lopez told the police that the gunman "talk[ed] like this" and had his lip "like this the whole time." In addition, the prosecutor wanted to present the testimony of one of the detectives who would reenact what Lopez demonstrated to him with respect to the way the gunman spoke. After extensive argument, the trial court sustained defendant's objection, finding that Lopez's prior statement and the detective's demonstrative evidence were hearsay.

Later in the trial, the prosecutor sought to limit the testimony of Doctor Mitchell Eisen, defendant's eyewitness identification expert. He wanted the court to bar the witness from offering an opinion utilizing the specific facts of the case. The parties discussed the type of hypothetical question that Doctor Eisen would be allowed to answer.

Defense counsel wanted to ask the following: "I can say a witness gives a detailed description of their assailant, including their height, their weight, the type of clothing they were wearing, perhaps other factors like the type of phone that they had. Now, assume that that person gave that information but that that person did not state anything about a physical handicap or difficulty with mobility or unusual speech pattern. Now, with that in mind, I would then ask, 'Based on your research, is it true that people who remember events — well, would be expected to remember at least some of those major factors that distinguish a person?' Something like that."

The prosecutor objected, arguing that Lopez had, in fact, noticed something unusual about the gunman's lip when he spoke. While he acknowledged the court had ruled that evidence was inadmissible, he had "ethical issues" with the court allowing a question based on a set of facts that everyone knew did not exist.

The court asked Doctor Eisen how he proposed to answer defendant's hypothetical. He replied, "I would tell the jury, first of all, I want to make sure that no one interprets in my answer that I have any opinions on this case in any regard. And what the research on point says is that people are — more easily remember the major defining features of someone's appearance than the more subtle, mundane features of their appearance. And that's really the bottom line. And I wouldn't go any farther than that."

The court ruled that it would allow the hypothetical question to be asked. It also concluded that it would permit the detective to testify to Cynthia Lopez's statement during the interview that she noticed something unusual about the gunman's lip. The court determined that if the expert was going to testify that witnesses generally notice more defining characteristics of individuals, it was appropriate to allow the prosecution to rebut the suggestion that none of its witnesses did so. It stated that Lopez's prior statement was "not coming in for the truth. It's coming in because the witness said something about his lip and about his talking."<sup>10</sup> And that's completely in response to the expert witness' testimony." Based on the court's ruling, defense counsel stated he was forced not to call Doctor Eisen.

Defendant contends, "[t]he trial court's erroneous ruling was prejudicial. [He] was forced to forego crucial defense evidence to prevent the admission of a hearsay statement which he had no ability to counter since Lopez had no recollection of making

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<sup>10</sup> The court told the parties it was prepared to give the jury a limiting instruction in that regard.

the statement or of observing anything reflected in the statement.”<sup>11</sup> We address defendant’s conclusion that the trial court’s ruling was erroneous.

The court determined that Lopez’s prior statement with regard to the gunman’s lip and speech was admissible in light of the expert’s point that witnesses readily remember a person’s distinctive characteristics. Defendant asserts that the statement was hearsay because it was offered to prove the truth of the matter asserted—that is, there was, in fact, something unusual about the gunman’s lip. We disagree.

Through his expert, defendant wanted to present the jury with the idea that if he had been one of the kidnappers, Lopez would have been expected to notice his limiting or unusual physical characteristics. Based on the evidence then in the record, the jury would have been left with the false impression that she did not. Her prior statement that she noticed certain peculiarities about the gunman was “““a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false.””” ( *People v. Fields* (1998) 61 Cal.App.4th 1063, 1070, quoting *People v. Decker* (1957) 155 Cal.App.2d 165, 170; *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1214-1215.) In our case, the fact in controversy was, without question, whether Lopez had said anything to police about the gunman’s features. For purposes of rebutting the testimony of defendant’s expert, it was relevant that Lopez made the statement regardless whether its substance was true. Thus, the trial court was correct in ruling the proffered evidence was not hearsay. Given that fact, the court had no improper hand in defense counsel’s tactical decision not to call the expert.

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<sup>11</sup> We have difficulty understanding defendant’s claim that he had no means of countering the admission of Lopez’s statement. This suggests there was some question as to whether she made it. Given that her statement was recorded, the fact that she uttered it was beyond dispute and trial counsel did not claim otherwise.

## II. Alleged Prosecutorial Misconduct

Defendant urges that the prosecutor committed prejudicial misconduct during argument. He claims his prior convictions were relevant solely on the issue of witness credibility, and contends the prosecutor improperly asked the jury to consider his prior convictions as evidence that he was not as disabled as he appeared.

After acknowledging defendant had some medical issues, the prosecutor argued, “[I]f you look at the defendant now three years after the crimes, and perhaps his medical condition worsened or not, I have no way of knowing it, Ladies and Gentlemen. But this is Mr. Medina that you see here in court. This crime happened in 2005. You are to decide whether Mr. Medina as he was in 2005 committed this particular crime. You know, he looks like a poor cripple man now in court. You see him, he barely moves, he barely understands questions proposed to him. I had to ask some questions twice or multiple times. But, Ladies and Gentlemen, don’t forget, you’re also dealing with [a] four time[] felon. And there is a jury instruction that says felony — the light should go into your head the list of things to look at to see whether somebody’s credible. One of the things is whether the witness was previously convicted of a felony. This gentleman right here, Mr. Medina, was convicted of four felonies that came in front of you. By the way, three of them he was convicted of after he had those injuries in 2001. There’s one in 2002, one in 2003, one in 2004. So his credibility is questionable for you. Four times is questionable because he is a felon.”

Initially, the Attorney General argues defendant forfeited the claim by failing to object in a timely fashion and request that the jury be admonished. We disagree. For tactical reasons, defense counsel objected out of the presence of the jury at the first opportunity. The court did not find anything improper with the argument. Thus, for forfeiture purposes, counsel is excused from failing to request an admonition. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.)

Addressing the merits, even if we assume the prosecutor’s cryptic comment that three of defendant’s convictions came after he was shot was improper, we conclude such misconduct was de minimus and constituted harmless error. The prosecutor did not

follow up by asking the jury to consider the priors in the manner defendant now condemns. In fact, the prosecutor returned to the theme of the role prior convictions have on a witness's veracity by arguing that defendant's credibility was questionable, which was appropriate. The one statement did not infect "the trial with such unfairness as to make [defendant's] conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) As a result, in order to gain a reversal for prosecutorial misconduct, it must be "reasonably probable that the jury would have reached a result more favorable to the defendant had the misconduct not occurred. [Citation.]" (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 243.)

Defendant complains that the prosecutor's argument improperly undermined the strong evidence that he was physically incapable of doing the things the alleged gunman in the kidnapping scheme was able to do. We are not persuaded. Defendant ignores the fact that the jury heard evidence that three months after the kidnapping, he led numerous police vehicles on a high speed chase through city streets and the freeway. This incident, much closer in time to the crime than the trial which took place two and a half years later, spoke volumes about defendant's physical capabilities when Lopez was taken.

In addition, we do not agree with defendant's assertion that the case against him was weak. Roberto Alba convinced the jury that he was defendant's accomplice, no doubt in large part because his testimony was supported by the evidence. Despite defendant's claim that he had seen Alba in passing on only one occasion, Alba knew defendant's nickname, the name of defendant's wife, and that the couple had two children. Lopez corroborated Alba's version of the facts by identifying defendant as the gunman from among 73 photographs shortly after the crime while her memory of the incident was still fresh. She also recalled many of the events as Alba did, namely, that the gunman was referred to as Javier, the kidnappers monitored her movements the day preceding the crime, and her captors moved locations because someone's mother was returning. Finally, defendant was caught driving a van that matched the description of the vehicle used in the kidnapping, and exhibited consciousness of guilt by fleeing from

the police. We conclude it is not reasonably probable the jury would have reached a more favorable verdict absent the one sentence uttered by the prosecutor in argument.

### **III. Alleged Instructional Error**

Relying on his argument that the prosecutor improperly urged the jury to consider his prior convictions as evidence of his physical ability to commit the alleged crimes, defendant claims the court should have instructed the jury that it could not use the priors as evidence of his propensity to commit crimes. He also contends his attorney was ineffective by failing to request such an instruction. Neither claim has merit.

We have set forth the prosecutor's argument. There is no question that he stressed that defendant's prior convictions were relevant on the issue of his credibility. Indeed, in his brief, defendant argues, "[i]t was misleading to tell the jury it could use [his] prior convictions to evaluate credibility when the prosecutor had argued credibility included determining whether the priors showed [he] was capable of committing the charged crime despite his disabilities." At no time did the prosecutor even hint that defendant's prior convictions could be used to prove that he had a disposition to commit crimes.

As defendant concedes, the court specifically informed the jury that a prior conviction of a witness "may be considered by you only for the purpose of determining the believability of that witness" (CALJIC No. 2.23) and that defendant's "prior felony convictions, if any, also relate to the issue of credibility which you have been previously instructed" (CALJIC No. 12.48.5, court's modification). Given that the jury was not told it could consider defendant's prior conviction for any other purpose, no further limiting instruction was warranted.

Defendant's reliance on *People v. Brown* (1993) 17 Cal.App.4th 1389 is misplaced. There, the trial court allowed evidence of prior uncharged acts and, in an attempt to make clear to the jury that the use of such evidence was limited, it read the very instruction, CALJIC No. 2.50, that defendant suggests should have been utilized in his trial. The appellate panel reversed Brown's conviction, finding that the ambiguous instruction "could invite a jury to consider a defendant's propensity to commit a crime;



e.g., the jury could interpret the language to mean they could consider the evidence presented as to the other molestations as tending to show Brown was a child molester and therefore his denial of molesting J. was less believable.” (*Id.* at pp. 1397-1398.)

In this case, as we have noted, the jury was told it could consider defendant’s prior conviction for one reason—to weigh his credibility. While it is arguable that the prosecutor intended that the jury consider defendant’s post-2001 priors as proof that he was not being credible with respect to his alleged disabilities, no reasonable reading of his remarks leads to the conclusion that he inferred defendant had a propensity to commit crimes. There was no reason to give the jury a further instruction with respect to defendant’s prior convictions and counsel was not ineffective by failing to request one.<sup>12</sup>

## **DISPOSITION**

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

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<sup>12</sup> Given our conclusions, defendant’s claim of cumulative error necessarily fails.